him what arrangements he was going to make for them. He replied that he had already prepared a will. Both Ahmad bin Abdul Razak and Shaik Ali testified that on the day of the execution of the will the deceased told them that he had written a will for his children. I am satisfied that, although the deceased could not write English and could only sign his name in English, he knew the contents of the will and approved of them.

The sixth ground is that the execution of the will was obtained by the undue influence of the plaintiff. The burden of proving this allegation was on the defendant. The only evidence given in support of this allegation was that whenever the defendant visited the deceased at the deceased's home at 69 Tras Street the plaintiff would stop talking to the deceased and leave the room; and that this conduct on her part aroused his suspicion. It seems to me that there is no substance in allegation of undue influence.

The third ground is that a Muslim cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts; and that testamentary dispositions in excess of the legal third cannot take effect, unless the heirs consent to them after the death of the testator. And the fourth ground is that a testamentary disposition by a Muslim to an heir is not valid unless the other heirs consent to the disposition after the death of the testator; and that any single heir may consent so as to bind his own share. Counsel for the defendant cited *Tyabji's Principles of Muhammadan Law*, 3rd edition, section 579 in support of both grounds. It is pointed out by counsel that by his will the deceased purported to give all his property to the plaintiff and her children without providing for his five children by his first wife: and that the latter have not consented to the disposition. It is contended that the will is, therefore, invalid in toto.

In my view, the will is entitled to probate, as the testator executed in accordance with the requirements of section 6 of the Wills Ordinance and as he appointed the plaintiff the executrix of the will. The authority for this view is the following statement in 16 *Halsbury's Laws of England*, 3rd edition, at page 172 :

> " Every instrument purporting to be testamentary .....and executed in accordance with the formal statutory requirements is entitled to probate if it purports to dispose of property.....or contains the appointment of an executor."

I consider this to be a correct statement of the law as regards testamentary instruments entitled to probate.

It seems to me that the defendant and other children by his first wife must make a separate application to the Court if they desire the Court to vary the will of the testator to make provision for them in accordance with the school of law of Islam to which the deceased belonged.

For the above reasons I order that probate of the will of the deceased be granted to the plaintiff as executrix named in his will and that the defendant pay the plaintiff her costs of this action.

Probate granted.

Solicitors: *Hilborne, Chung & Co., S. C. Goho & Co.*

KEPONG PROSPECTING LTD. v. SCHMIDT

[C.A. (Thomson C.J., Hill and Good JJ.A.)
August 21, 1962]

[K.L. — F.M. Civil Appeal No. 22 of 1962]

Debtors Ordinance, 1957, s.19 — Pending proceedings — Attachment of property before judgment — Certain requirements to be fulfilled before granting order for attachment.

Practice and Procedure — Attachment — Seizure of property before judgment — Debtors Ordinance, 1957, s.19.

The respondent was a consulting engineer and the appellant company were the holders of certain mining leases in respect of deposits of iron ore. They did not work these deposits themselves but allowed them to be worked on tribute by another company named Kepong Mines Ltd. and their business in practice would seem to be confined to collecting the tribute and distributing it to their shareholders after making arrangements in respect of income tax. The respondent claimed that he was entitled to receive certain payments in respect of all ore won on the appellants' land while the appellants state that various agreements under which the respondent claims are either invalid or unenforceable. On June 26, 1961 the respondent took out a summons in chambers issued *ex parte* praying that the moneys standing to the credit of the appellant company in the Oversea Union Bank and the Bank of Canton be attached as pledge or security for satisfaction of any judgment that might be made in the respondent's favour on two grounds — (a) that a petition had been presented in the Singapore Court for compulsory winding up of Kepong Mines Ltd. and a provisional liquidator had been appointed and (b) that the appellant company had been distributing the greater part of its receipts in payment of dividends and does not show that it was intended to satisfy any judgment entered against the appellant company. Hashim J. made an order attaching the bank accounts subject to a limit of $180,000 and this order was served on the banks in question. On July 6, 1961 the appellant company took out a summons in chambers to have the order of Hashim J. set aside on the ground that they had never at any time had any intention of obstructing or delaying the execution of any judgment which may be made against them and that the respondent had no grounds whatsoever for saying that they had. The summons was adjourned into open Court and dismissed by Hashim J. On appeal by the company,

Held: (1) the respondent's application was of necessity made under section 19 of the Debtors Ordinance

as that was the only provision of the law enabling such an attachment. An applicant for an order under that section must satisfy the Court: (a) that he has a "good cause of action" and (b) that the "defendant with intent to obstruct or delay the execution of any judgment" has removed or is about to remove or has concealed or is concealing or making away with or handing over to others any of his movable or immovable property;

(2) there was not a scrap of evidence on oath that the respondent had a cause of action at all or that the appellant company had handed over a great deal of their property or money over to others or that they had altered their course of business with intent to obstruct or delay any judgment the respondent might obtain.

Case referred to:—

(1) *Nowroji Pudumjee Siradar* v. *The Deccan Bank Ltd.*, I.L.R. 45 Bom. 1256, 1258; A.I.R. 1921 Bom. 69.

COURT OF APPEAL.

Peter Mooney for the appellant.

R. Ramani for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This is an appeal against an Order made by Hashim J. in the course of litigation, which is still proceeding, to which the appellant and the respondent are parties. There are third parties in the case but so far as the present appeal is concerned they are not interested, at least not on the face of the proceedings, and they can be ignored. In the substantive proceedings the respondent is the plaintiff and the appellant company are the defendants and I think it will make for clarity if I refer to them as such.

The plaintiff is a consulting engineer and the defendant company are the holders of certain mining leases in respect of deposits of iron ore. They do not work those deposits themselves but allow them to be worked on tribute by another company named Kepong Mines, Limited, and their business in practice would seem to be confined to collecting the tribute and distributing it to their shareholders after making arrangements in respect of Income Tax.

The plaintiff's claim was, and is, that he is entitled to receive certain payments in respect of all ore won on the defendant's lands and the defence is that various agreements under which he claims are either invalid or unenforceable. There is also a counterclaim by the defendant company. That is a very brief summary of a very complicated piece of litigation but I think it is adequate for the purposes of the present appeal.

On 26th June, 1961, the plaintiff took out a summons praying that the moneys standing to the credit of the defendant company in accounts with the Oversea Union Bank and the Bank of Canton be attached as pledge or security for satisfaction of any judgment that might be made in his favour against the defendant company. That summons was issued *ex parte* and was not served on anybody and the same day an Order was made by Hashim J. in Chambers attaching the bank accounts as prayed but subject to a limit of $180,000. That Order was served on the banks in question.

On 6th July, 1961, the defendant company took out a Summons in Chambers to have the *ex parte* Order of 26th June set aside. That Summons was adjourned into open Court and was finally heard and disposed of on 23rd April, 1962, when it was dismissed. Against that dismissal the defendant company has now appealed.

The grounds on which the plaintiff asked for attachment are set out in the affidavit which supported his application and although they were originally connected with each other can now be divided into two. The first was that a petition had been presented in the Singapore Court for the compulsory winding-up of Kepong Mines, Limited, the company which was working the defendant company's iron ore, and that a provisional liquidator had been appointed. That petition, however, was later withdrawn and it seems to be common ground that so far as concerns the present appeal it can be disregarded.

The other ground was based on averments as to the way in which the defendant carried on business which are substantially admitted to be true. The only source of income of the company is the tribute it receives from Kepong Mines, Limited, and all it does is to receive this tribute and distribute it to the shareholders. The Directors' Report for 1960 shows that, subject to the creation of some sort of Income Tax reserve, the company had at that time been distributing, and intended to go on distributing, by far the greater part of its receipts in the payment of dividends and does not show that it was intended to make any provision in respect of any judgment that might be entered at the suit of the plaintiff.

In support of the defendant company's application to have the attachment set aside there was an affidavit by the Chairman of the Board of Directors. That affidavit did not deny what the plaintiff had said regarding the company's method of conducting its business. It did, however, say that "the defendant has never at any time had any intention of obstructing or delaying the execution of any judgment which may be made against it and the plaintiff has no ground whatsoever for saying that it has". It went on to say that the company had cash in hand amounting to about $458,000 (which is in excess of any estimate I can find of the value of the plaintiff's claim) and was in regular receipt of tribute from Kepong Mines, Limited. To that there was no affidavit in reply.

On that material Hashim J. came to the following conclusion :—

" (a) Defendant has been receiving tribute from Kepong Mines Ltd. and the tribute is its sole asset.

(b) Money in a bank can be withdrawn at any time and if the order of attachment is set aside there is nothing to prevent defendant from drawing all the money from the banks.

(c) The amount attached is $180,000 and it will not cause any hardship to set aside this sum especially as it had $458,000 in hand on 6th July, 1961.

(d) If the Kepong Mines Ltd. cease working there will be no tribute to defendant."

On these grounds he dismissed the defendant company's application.

The plaintiff's application for attachment was of necessity made under section 19 of the Debtors Ordinance, 1957, which is the only provision of the law enabling such an attachment to be made.

The provisions of that section so far as they are relevant to the present case read as follows :—

"19. (1) If it is shown to the satisfaction of the Court, at any time after the issue of a writ of summons, by evidence on oath, that the plaintiff has a good cause of action against the defendant, and—

.....

(c) that the defendant, with intent to obstruct or delay the execution of any judgment which has been or may be made against him, has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property;

....."

From the wording of the section it is clear that the applicant for such an Order must satisfy the Court by evidence on oath of two things. The first is that he has a "good cause of action". The second is that the defendant "with intent to obstruct or delay the execution of any judgment" has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property.

For myself, I do not find it necessary to discuss the first of these requirements at length. The truth is that here there is not a scrap of "evidence on oath" that the plaintiff has any cause of action at all, far less a "good cause of action", whatever precisely these words may mean. It is irrelevant to speculate as to what the position would have been had the proceedings been commenced by way of Plaint under the old Civil Procedure Code. They were commenced by Writ under the existing procedure and at no stage has anything been verified on oath except what his claim is. This may appear to be a somewhat technical and cursory way of disposing of the point but in view of other conclusions to which I have been compelled I do not propose to take it any further.

With regard to the second requirement of the section, there is here no question of concealing property or anything of that sort. It is freely admitted that the defendant company has handed a great deal of its property over to others, in that it has handed over a great deal of its money over to its shareholders who are of course different persons from itself. The real question is whether there was any evidence on oath that that handing over was done "with intent to obstruct or delay" any judgment the plaintiff might obtain.

Here I do not wish to appear to be unduly technical. I entirely agree with the argument of Enche Ramani that this requirement is sufficiently fulfilled if the applicant satisfies the Court of the existence of facts from which the inference should be drawn that there has been the required intent. On a perusal of the affidavits, however, it is impossible to say that they make out more than that the defendant company's business, which is not of an unusual sort, is such that a creditor who got a judgment against it might if he attempted to do so at an unpropitious time find his judgment difficult of immediate enforcement. But that, alas, is a risk which must be accepted by every litigant. And here there is nothing whatever to show that the company have altered their course of business by reason of the present proceedings, there is nothing to show that they have done anything they were not in the way of doing before and irrespective of the plaintiff's claim. All that has been shewn is that they have not specifically put aside a sum of money against the eventuality that that claim may succeed, a point on which they have presumably taken professional advice, and it would be wrong to say that there was any obligation upon them to do so, far less that failure to do so would make out the sort of intention that the section requires. As was said by Sir Norman Macleod in the case of *Nowroji Pudumjee Siradar* v. *The Deccan Bank Ltd.* (1) in considering a similar provision in the law of India :—

"A man is not debarred from dealing with his property because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings he sells some of his property, that would be at once a sufficient ground to satisfy the Court that he is disposing of his property with intent to defraud the plaintiff. Clearly there must be additional circumstances before the Court can be satisfied that such an intention exists."

I am not unmindful of the argument that the question was one for the discretion of the trial Judge and that we should not interfere with the exercise of his discretion. I have, however, quoted the conclusions at which he arrived and whether or not these conclusions be fully justified they go no further than making out that the plaintiff may (not must necessarily) find any judgment he may obtain difficult of immediate enforcement and that it would not cause any hardship to the company to make provision against the contingency of the plaintiff succeeding. That may all be very true. But it is not relevant, it does not lead to the conclusion that there is an intent to obstruct or delay any judgment the plaintiff may ultimately obtain.

For these reasons I would allow the appeal with costs and set aside the *ex parte* Order of 26th June, 1961.

Enche Mooney has raised, but not very strenuously, the question of his client's remedy under section 23 of the Ordinance. I do not really think that section is altogether intended to be applied in a case like this and think the appellant can well be left to take such other proceedings as he may consider desirable.

Hill and **Good JJ.A.** concurred.

Appeal allowed.

Solicitors: *Bannon & Bailey; Braddell & Ramani.*

SATHAPPAN v. LIM CHOOI HOCK & ANOR.

[O. C. J. (Ong J.) August 27, 1962]

[K.L. — Civil Suit No. 352 of 1961]

Debtor — Judgment debtor — Application for committal — Payment by instalments — Principles on which the order for committal should or should not be made — Debtors Ordinance, 1957, s.4(3), (7), (9).

The judgment creditor applied under section 4(7), Debtors Ordinance, 1957, for the judgment debtors to show cause why they should not be committed to prison for having wilfully neglected to comply with an order of court made on April 9, 1962 by failing to pay two instalments of $100 each due on May 1 and June 1, 1962.

The judgment debtors are husband and wife who earn their living by making cakes which are sold in the streets by itinerant Tamil hawkers who keep 30 to 40% of the day's takings as their remuneration or commission. The debtors bear the risk of cakes being unsold at the end of the day when the remainder would be returned to them. Such cakes would not be saleable the next day. The above evidence of their occupation was given by the debtors themselves at the hearing of a judgment debtor summons on April 9, 1962, when they said that the husband made an average of $2 to $3 profit per day, just enough for their own living expenses. The wife helped the husband in domestic chores and in the cake-making. The judgment creditor, without giving any evidence himself, or calling any witnesses under section 4(3) of the Ordinance, to establish the means of the debtors, asked for an order against them for payment of $700 per month. An order was then made that the debtors should pay $100 per month with effect from May 1, 1962.

On an application for their committal to prison for non-payment of two instalments,

Held: the evidence of the judgment creditor and the evidence called by him to supply information respecting the debtors' ability to pay fell far short of the requirements specified in section 4(9) and the application should be dismissed.

Principles set out in *In re A Judgment Debtor (No. 23 of 1934)* (1) followed.

Case referred to:—

(1) *In re A Judgment Debtor (No. 23 of 1934)* [1935] W.N. 128.

CIVIL SUIT.

V. Oorjitham for the plaintiff.

Defendants in person.

Cur. Adv. Vult.

Ong J.: The judgment creditor applied under sub-section (7) of section 4 of the Debtors Ordinance, 1957, for the judgment debtors to show cause why they should not be committed to prison for having wilfully neglected to comply with an order of Court made on April 9, 1962 by failing to pay two instalments of $100 each due on May 1 and June 1, 1962.

The judgment debtors are husband and wife who earn their living by making cakes which are sold in the streets by itinerant Tamil hawkers who keep 30 to 40 per cent of the day's takings as their remuneration or commission. The debtors bear the risk of cakes being unsold at the end of the day when the remainder would be returned to them. Such cakes would not be saleable the next day. The above evidence of their occupation was given by the debtors themselves at the hearing of judgment debtor summons on April 9, 1962, when they said that the husband made an average of $2 to $3 profit per day, just enough for their own living expenses. The wife helped the husband in domestic chores and in the cake-making. The judgment creditor, without giving any evidence himself, or calling any witnesses under sub-section (3) of section 4 of the Ordinance, to establish the means of the debtors, asked for an order against them for payment of $700 per month. An order was then made that the debtors should pay $100 per month with effect from May 1, 1962.

An application for their committal to prison for non-payment of two instalments was in due course made before me. Speaking for myself, I was not satisfied, after perusing the evidence taken on the judgment debtor summons, that the debtors had the means then or since to pay $100 per month or anything near that sum. The wife at any rate had certainly no means of her own from any extraneous source of income or gainful employment, and speaking again for myself, I should have been unable to make any order against her. As I had been compelled to take this view on the evidence, I adjourned the application to allow the judgment creditor an opportunity to subpoena such witnesses as he might choose to call for the purpose of supplying information respecting the debtors' ability to pay the monthly instalments. The evidence he has called today in fact corroborated what was said by the debtors themselves as to their means, and it falls very far short of satisfying me, under sub-section (9) of section 4 that since the date of the order directing payment the debtors, or either of them, has had sufficient means to comply with the order. I am bound accordingly to dismiss this application in accordance with the statement of principles set out in *In re A Judgment Debtor (No. 23 of 1934),*(1) where it was said :

"If the debtor makes default in payment of one or more instalments, the judgment creditor may issue a fresh judgment summons. On the hearing of that summons, the court has to consider, as Willes J. held in *Re The Debtors Act,* (1870) 22 L.T. 666, and referred to by Lord Esher M.R. in *Reg.* v. *Judge of Brompton County Court and Reeves,* 18 Q.B.D. 213, 217, whether the debtor has or since the due date of the several instalments has had such means as would have enabled him to obey the order by payment. At this stage the prospects which the debtor may have of paying in the future are not material and cannot be considered. The Act is not in-